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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN JAIME SANCHEZ,

Defendant and Appellant.

G039102

(Super. Ct. No. 06SF0017)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Wendy S. Lindley, Judge. Affirmed as modified.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

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Juan Jaime Sanchez (defendant) was charged by information with assault with a deadly weapon, in violation of Penal Code section 245, subdivision (a)(1) (count one), burglary of a residence with the intent to commit corporal injury to the mother of his child, in violation of Penal Code sections 459 and 460, subdivision (a) (count two), and domestic battery with corporal injury, in violation of Penal Code section 273.5, subdivision (a) (count three). It was also alleged that defendant had three prior strike convictions, a prison prior conviction, and a serious felony prior conviction.

The jury found defendant not guilty as charged on count one, but guilty of the lesser included offense of misdemeanor assault, in violation of Penal Code section 240. In addition, the jury found defendant not guilty on count two. The court declared a mistrial as to count three, due to the jury's inability to reach a verdict on that count. On retrial of count three, the jury found defendant guilty of domestic battery with corporal injury. The court declined defendant's invitation to strike one or more prior convictions, pursuant to penal Code section 1385. It sentenced him to a total of 25 years to life.

Defendant appeals. He argues, with respect to the retrial of count three, that the court gave an erroneous and prejudicial response to a jury request for clarification of an instruction. He also asserts that the court abused its discretion in declining to dismiss any of his prior convictions. In addition, defendant contends that the abstracts of judgment contain errors that should be corrected.

We affirm. To the extent the court may have given an erroneous response to the jury's question, the error was both invited error and harmless error, and the court did not abuse its discretion in declining to dismiss any of the prior convictions. However, we agree with defendant that the abstracts of judgment should be corrected and we order the clerk of the court to correct the abstracts as directed herein.

I

FACTS

At about 12:40 a.m. on December 25, 2005, San Clemente Deputy Sheriff Edward Manhart (Manhart) was dispatched to an apartment complex. There, he found Noel Santana Mena (Mena), whose face and head were covered in blood, on the porch at the apartment complex. Mena's shirt was saturated with blood and there were blood stains on the porch. Mena told Manhart, who was wearing a recording device, that defendant had struck him in the face with a beer bottle.

Mena's apartment was located above the apartment of his sister, Carolina G. (Carolina). Carolina shared the apartment with her three children, who are also defendant's children. Carolina and defendant were not married.

After the incident, Mena further told Manhart that, at about 12:30 a.m., he heard Carolina screaming and ran to her apartment. Once inside, he saw defendant on the bed, punching Carolina in the back and pulling her hair. Mena said he pulled defendant off the bed, and then defendant grabbed a beer bottle and hit him in the face with it. Mena then ran from defendant, but defendant caught him and started beating him, punching him 20 or 30 times.

Carolina and one of her children, 11-year-old Juan Sanchez, Jr. (Juan Jr.), gave Manhart the same story. They both told Manhart that defendant did not live with them. Carolina and Juan Jr. each told Manhart that defendant entered the sliding glass door in the apartment, came into the bedroom where Carolina was sleeping next to her daughter, jumped on top of Carolina, pulled her hair and struck her numerous times in the back. After Carolina started screaming, Mena came in and pulled defendant off her. Defendant grabbed a beer bottle and struck Mena in the face with it. Defendant jumped on top of Mena and hit him numerous times in the head. Carolina said defendant punched him about 20 times.

At trial, Carolina, Juan Jr. and Mena all changed their stories. Carolina testified that defendant did not jump on her, strike her or pull her hair, and that it was Mena who hit defendant with the beer bottle. Juan Jr. also testified that he had lied to Manhart on each of these points. Mena testified that he was the one who had used the beer bottle, to hit defendant, and that he never told Manhart that defendant had struck Carolina or pulled her hair. He explained that he lied to Manhart about defendant hitting him with the beer bottle.

Where evidence of Carolina's injuries is concerned, Manhart testified that he observed injuries on her body, including a contusion on her back left shoulder. People's exhibits 2 through 4, admitted into evidence on retrial, were photographs that showed injury to Carolina. Exhibit 2 showed redness on the back of her arm and shoulder. Exhibit 3 showed redness on the front of her arm. Exhibit 4 showed a slight bruise and redness on her back.

On retrial of count three, defendant's defense was that any injury to Carolina did not constitute a felony offense. He argued that the mark on Carolina's back did not amount to a traumatic condition, as defined in Penal Code section 273.5, and that he was at most guilty of misdemeanor battery.

The court instructed the jury: "The defendant is charged . . . with inflicting an injury on . . . the (mother) of (his child) that resulted in a traumatic condition. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant willfully inflicted a physical injury on the (mother) of (his child); [¶] [AND] [¶] 2. The injury inflicted by the defendant resulted in a traumatic condition. [¶] . . . [¶] A traumatic condition is a wound or other bodily injury, whether minor or serious, caused by the direct application of physical force. . . ."

The jury sent the court the following question: "Is there [a] physical injury that does not cause a [traumatic] condition? [¶] (REF No 840 # 2) [¶] If so, please give examples." The court's written response stated simply "answer: no." Shortly thereafter,

the jury returned its verdict, finding defendant guilty of domestic battery with corporal injury.

II

DISCUSSION

A. *Penal Code section 273.5:*

Penal Code section 273.5, subdivision (a) provides in pertinent part: “Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition, is guilty of a felony” Subdivision (c) of that statute provides: “As used in this section, ‘traumatic condition’ means a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by a physical force.”

B. *Jury Instruction:*

Defendant concedes that the instructions the court initially gave the jury with respect to Penal Code section 273.5 were correct. However, he argues that the court erred in its response to the jury’s question regarding the statutory requirements. Defendant correctly maintains that a conviction under section 273.5 requires evidence of a traumatic condition. (Pen. Code, § 273.5, subd. (a); *People v. Abrego* (1993) 21 Cal.App.4th 133, 136-138.) As he also points out, soreness, tenderness, or emotional harm standing alone are insufficient. (*Id.* at p. 138.) However, as *People v. Abrego* also states, minor injuries such as bruises suffice. (*Id.* at p. 137.)

Defendant argues that the court’s response to the jury’s question could be construed as meaning that to convict defendant, “they only had to find that [he] inflicted a physical injury on [Carolina],” and did not need to find that the injury resulted in a traumatic condition, “because all physical injuries cause traumatic conditions.” He says

that this was prejudicial error, because his defense was that any injury he may have inflicted did not cause a traumatic condition.

The Attorney General contends that if in using the word “physical” in its question the jury “meant a visible injury . . . such as a bruise, then the trial court correctly answered the question because such an injury would also necessarily constitute an injury and a traumatic condition.” (*People v. Abrego, supra*, 21 Cal.App.4th at p. 137 [bruises constitute traumatic conditions].) On the other hand, the Attorney General concedes that if the jury used the term “physical” to mean a “physical attack” on the victim, then the court’s response to the question was arguably incorrect, inasmuch as a physical attack that caused emotional trauma or pain alone would not satisfy the requirements of the statute.

The Attorney General argues that if the court answered the question incorrectly, it did so based on defendant’s invited error, which cannot form the basis of an appeal. (*People v. Wader* (1993) 5 Cal.4th 610, 657-658 [invited error doctrine precludes instructional error argument on appeal].) The Attorney General explains that defendant, during a conference call with the court, agreed to the answer given to the jury. Defendant, on the other hand, insists that the record does not show that he agreed to the answer, but only shows that his counsel participated in a conference call.

A minute order of June 8, 2007 reflects that the jury submitted its question at 4:37 p.m. The order states: “At 4:42pm both Parties confer by Conference Call with the Court on the Question and submit an answer to the Jury[.]” Reduced to its essence, the minute order states: “[B]oth Parties confer . . . and *submit* an answer to the Jury.” (Italics added.) This language indicates more than defendant suggests. Rather than showing only that defendant’s counsel was involved in a conference call before the court sent the answer, it indicates that both parties *submitted* the answer.

“We cannot presume the trial court has erred. The Court of Appeal has held: “A judgment or order of the lower court is *presumed correct*. All intendments and

presumptions are indulged to support it on matters as to which the record is silent. . . .” [Citation.]’ [Citations.]” (*Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447.) The absence of anything more specific in the record to show that the minute order erroneously characterized the parties’ action as a submission of the answer to the jury’s question precludes a determination that the parties’ action amounted to something else. (See *id.* at p. 448.) There is nothing in the record to indicate, for example, that defendant made any objection to the instruction or asked for an opportunity to appear to argue the matter. “By appealing, [defendant] assumed ‘the burden of showing reversible error by an adequate record.’ [Citation.]” (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1433.) It was also his obligation to make a record by raising the issue in the court below. (*Ibid.*)

“When defense counsel makes [a] . . . conscious and deliberate tactical choice to request a particular instruction—such as the instruction defense counsel specifically requested here,” the invited error doctrine precludes the defendant from arguing on appeal that the instruction was given in error. (*People v. Wader, supra*, 5 Cal.4th at pp. 657-658.) Defendant says *People v. Wader* is inapplicable, inasmuch as the record does not disclose whether his trial counsel had any tactical purpose in connection with the purported submission of the response to the jury’s question, or whether his counsel may have acted in ignorance. But again, it was his burden to make a record on the point in the trial court (*Tudor Ranches, Inc. v. State Comp. Ins. Fund, supra*, 65 Cal.App.4th at p. 1433), just as it is his burden on appeal to demonstrate reversible error (*Virtanen v. O’Connell* (2006) 140 Cal.App.4th 688, 710). He has not met his burdens.

This is not the only reason for affirmance, however. As the Attorney General points out, any error was harmless error, irrespective of whether it was also invited error. Manhart testified that he observed injuries on Carolina’s body, including a contusion on her back left shoulder. People’s exhibits 2 through 4 showed what

defendant himself characterizes as “some redness on [Carolina’s] shoulder and arm, and redness and a slight bruise in the middle of her back.” As *People v. Abrego* makes clear, evidence of minor injuries such as bruises constitutes evidence of a traumatic condition. (*People v. Abrego, supra*, 21 Cal.App.4th at p. 137; see also, *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1085-1086.) This notwithstanding, defendant insists the court made a prejudicial error.

In cases involving misinstruction on an element of an offense, we apply the harmless error test. (*People v. Harris* (1994) 9 Cal.4th 407, 424.) In other words, we ask “whether it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’ [Citations.]” (*Id.* at pp. 424-425.) Defendant maintains that the instruction in question clearly contributed to the verdict inasmuch as the jury returned its verdict in what he describes as “five minutes” after the instruction was given. To be precise, the record reflects that the jury returned to the courtroom with its verdict 25 minutes after the court gave its answer to the question posed. This information alone, however, is not determinative.

“‘To say that an error did not contribute to the verdict is, rather, to find that error unimportant *in relation to everything else the jury considered on the issue in question, as revealed in the record.*’” (*People v. Harris, supra*, 9 Cal.4th at p. 426; accord, *People v. Ryan* (1999) 76 Cal.App.4th 1304, 1320.) Here, the testimony of Manhart and People’s exhibits 2 through 4 provided evidence of bruising, which, under the law, constituted a traumatic condition, even if minor in severity. (*People v. Abrego, supra*, 21 Cal.App.4th at p. 137; see also, *People v. Beasley, supra*, 105 Cal.App.4th at pp. 1085-1086.) The ambiguity in the instruction was unimportant in relation to the evidence the jury considered with respect to the traumatic condition. In sum, an examination of the record as a whole, including the evidence of a traumatic condition, shows that any error was harmless.

C. Failure to Dismiss Prior Strike Convictions:

The information alleged three prior strike convictions, for attempted rape, assault with intent to commit rape, and residential burglary, all arising out of a single prior case. Defendant waived his right to a jury trial with respect to the prior conviction allegations and admitted the truth of the convictions.

Before sentencing in the case before us, defendant filed an invitation to the court to exercise its discretion under Penal Code section 1385 to strike prior convictions. Penal Code section 1385, subdivision (a) authorizes a trial court “to strike factual allegations relevant to sentencing, such as the allegation that a defendant has prior felony convictions. [Citations.]” (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504.) Defendant suggested that the court strike all of his prior convictions, or at least two of them. Defendant said: “The priors here are burglary, assault with intent to commit sodomy and attempted rape which were so closely connected as to have arisen from a single act. Accordingly the Court should construe them as one strike. [¶] Another factor the court should consider is the fact that the current offenses are not serious: one is a misdemeanor and the other is a non-serious felony; and I mean non-serious in both a legal and factual sense.”

“[A] trial court’s refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion.” (*People v. Carmony* (2004) 33 Cal.4th 367, 375.) “““ The trial court’s power to dismiss an action under [Penal Code section 1385(a)], while broad, is by no means absolute. Rather, it is limited by the amorphous concept which requires that the dismissal be ‘in furtherance of justice.’””” (*People v. Williams* (1998) 17 Cal.4th 148, 158-159.) In determining whether a dismissal would further justice, the court “must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [“Three Strikes” law] scheme’s spirit, in whole or

in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*Id.* at p. 161.) “[T]he circumstances must be ‘extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack’ [citation]” (*People v. Carmony, supra*, 33 Cal.4th at p. 378.)

Defendant contends the court abused its discretion in declining his invitation to strike prior convictions. He does not renew the arguments he made in his invitation. Rather, defendant now argues the trial court abused its discretion by relying on factual findings having no support in the evidence.

In denying defendant’s invitation, the court stated: “In evaluation of the Three Strikes law to this defendant, I do need to look at his criminal history. The defendant has continued to commit crimes since 1995 and he has not been successful on probation or parole. [¶] And both the prior and this case did involve violence against women. And in this case it also involved violence against a male victim, as well. [¶] The defendant’s history at this point does not bode well for successful completion of probation and/or parole.” The court also stated: “The prior case, the defendant entered the home of a stranger in the middle of the night and attacked her for his own sexual gratification. In this case, the defendant did the same thing and then used a weapon on the . . . victim’s defender. [¶] I think that the interest of the community is protected when the Three Strikes law is properly imposed upon individuals who are a public safety risk, such as Juan Sanchez. And as a result, the *Romero* motion is denied.”

Defendant focuses on the portion of the court’s comments to the effect that he entered the home of another and used a weapon. Defendant emphasizes that he was not found guilty of either residential burglary or assault with a deadly weapon. Therefore, he concludes that the facts the court used to decline his invitation were not

supported by substantial evidence and that, therefore, the trial court abused its discretion in making its ruling.

In support of his position, defendant cites *People v. Cluff* (2001) 87 Cal.App.4th 991. In that case, the appellate court held that the trial court abused its discretion in denying the defendant's motion to strike prior conviction allegations. It vacated the sentence and remanded for a new hearing under *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497, because substantial evidence did not support the trial court's inference that the defendant failed to update his sexual offender registration in order to cloud his residency or evade law enforcement. (*People v. Cluff*, *supra*, 87 Cal.App.4th at pp. 994, 1003-1004.) In the context before it, the appellate court stated: "A trial court abuses its discretion when the factual findings critical to its decision find no support in the evidence." (*Id.* at p. 998.)

In the case before us, however, the record contains evidence to support findings that defendant entered a home in which he did not reside and that he used a weapon on Mena. Where the residency issue is concerned, Manhart testified that both Carolina and Juan Jr. told him, on December 25, 2005, that defendant did not reside with them. At trial, Carolina confirmed that she had told Manhart, on December 25, 2005, that defendant was not then living with her. However, she also testified that the information she had given Manhart was false—that in fact defendant had been living with her on December 25, 2005 despite her contrary statement to Manhart. At trial, Juan Jr. also said that he had lied to Manhart about where defendant lived, because Carolina asked him to. He explained that he would lie if Carolina asked him to, because he loved her. Carolina also testified that she loved defendant, needed his financial help, and wanted him to come home, and that it was important to her to have defendant, as the father of her children, around.

As for the use of a weapon, Manhart testified that Mena, Carolina and Juan Jr. each told him that defendant had struck him in the face with a beer bottle. In addition,

Manhart said that he found a shattered beer bottle at the threshold to the bedroom. He also testified that he observed injuries on Mena that were consistent with being struck in the face with a beer bottle. Mena had such profuse bleeding that his face and head were covered with blood, his shirt was saturated with blood, and blood was on the porch area. Manhart called the paramedics, who treated him and took him to the hospital.

Although Mena, Carolina, and Juan Jr. each changed their stories at trial, and said it was not defendant who hit Mena with a beer bottle, but rather that it was the reverse, each one of them admitted to lying to Manhart, as to certain points. It was up to the trial court, in evaluating defendant's invitation, to weigh the credibility of the witnesses and to determine when they were lying. (*Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 622 [credibility is issue for finder of fact].) Inasmuch as Manhart was wearing a recording device when he interviewed Mena, Carolina, and Juan Jr. on December 25, 2005, the court could reasonably give greater weight to the testimony of Manhart. "When, as here, 'the evidence gives rise to conflicting reasonable inferences, one of which supports the findings of the trial court, the trial court's finding is conclusive on appeal. [Citations.]' [Citation.]" (*Id.* at p. 623.)

Although the jury did not convict defendant of either residential burglary or assault with a deadly weapon, that does not mean that the trial court erred in considering whether defendant entered a residence he did not occupy or used a weapon against Mena. An acquittal simply means that the jury was not convinced as to one or more elements of a crime beyond a reasonable doubt. (*People v. Dove* (2004) 124 Cal.App.4th 1, 11.) However, "'a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence'[]" [citations]." (*Ibid.*)

Defendant notes that the trial court did not articulate that it found, by a preponderance of the evidence, that he had committed either a burglary of Carolina's residence or an assault with a deadly weapon on Mena. He contends that because those

facts had not been found true by a preponderance of the evidence, a remand for a new sentencing hearing is required. However, we imply all findings necessary to support the decision of the trial court. (*People v. Francis* (2002) 98 Cal.App.4th 873, 877-878.) The record supports the trial court's implied findings, that were based on a preponderance of the evidence.

D. Correction of Abstracts of Judgment:

Finally, defendant argues that two abstracts of judgment contain errors that must be corrected. The Attorney General agrees, as do we. "It is, of course, important that courts correct errors and omissions in abstracts of judgment." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

One abstract of judgment, apparently intended to reflect the outcome of the first trial, erroneously stated that defendant was convicted of aggravated assault in contravention of Penal Code section 245, subdivision (a)(1), instead of stating that defendant was convicted of misdemeanor assault, in violation of Penal Code section 240. Even though the abstract correctly showed that the sentence on that conviction was stayed, the abstract nonetheless must be corrected to reflect a conviction under Penal Code section 240, rather than a conviction under Penal Code section 245, subdivision (a)(1).

Another abstract of judgment, apparently prepared to show the result of the second trial, reflected that defendant was convicted of domestic corporal injury in violation of Penal Code section 273.5, subdivision (a) and sentenced to 25 years to life in state prison. However, it failed to make note of defendant's credit for time served. The court ordered a total credit of 633 days for time served, consisting of 422 actual days and 211 days for conduct.

The clerk of the court is ordered to correct the two abstracts of judgment to eliminate these errors, so that the first abstract of judgment properly reflects the

conviction on count one, and the second abstract of judgment shows the credit for time served. (*People v. Mitchell, supra*, 26 Cal.4th at p. 188.)

III

DISPOSITION

The clerk of the court is directed to correct the two abstracts of judgment as specified herein. The clerk shall forward new abstracts of judgment to the California Department of Corrections. As modified, the judgment is affirmed.

MOORE, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.